Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-93-18

FACTS:

You represent a municipal agency (Agency A) in the Town. Mr. X[1/] is a full-time employee at Agency A. His normally scheduled hours at Agency A are 7:30 a.m. to 3:30 p.m., Monday through Friday. He is also on call one weekend per month. Mr. X also has a part-time post with the Town, assigned to a second municipal agency (Agency B). His work hours at Agency B are normally scheduled after 4 p.m. on weekdays and during the day on weekends, for an average of 20 hours per week. The position at Agency B is designated as a "special municipal employee" post. When Mr. X is on call for Agency A, he is required to respond, even if he is working at Agency B.

QUESTIONS:

1. Can Mr. X be designated as a "special municipal employee" in his position with Agency A?

2. Can Mr. X hold both municipal positions simultaneously?

ANSWERS:

1. No, as he works full-time in that position.

2. No, unless he reduces the number of hours he works at Agency B to no more than 500 hours per year.

DISCUSSION:

1. Special Municipal Employee Status

The term "employee" at each level of government (state, county and municipal) is defined in G.L. c. 268A very expansively. One is considered an employee of a particular level of government if he performs services for the government or holds any office, position, employment or membership in any of its agencies or instrumentalities.[2/] An individual is a government employee whether he is paid or unpaid, or whether he works full-time or part-time. Individuals working on an intermittent basis, or as consultants, are also defined as government employees. However, certain provisions of the conflict of interest law distinguish between regular employees and "special" employees. The distinction is important since those provisions of the conflict law apply in a less restrictive fashion for "special" employees.

A municipal employee[3/] can be designated as a "special municipal employee" only if one of the following conditions exists:

1. He is unpaid, or

2. By its classification in the municipal agency involved or by the terms of the contract or conditions of employment, the employee is permitted "personal or private employment" during "normal working hours", or

3. He did not earn compensation for more than 800 hours in the position during the preceding 365

days.[4/] G.L. c. 268A, §1(n).

You have urged that we read §1(n) to permit a full-time employee who works on other than a 9 a.m. to 5 p.m. schedule to attain special employee status.[5/] To achieve this result, you would have us interpret the phrase "normal working hours" to mean employment from 9 a.m. to 5 p.m. In this way, you argue, Mr. X would be entitled to special employee status because the conditions of his employment with Agency A (specifically, his 7:30 a.m. to 3:30 p.m. schedule) would "permit[] personal or private employment during normal working hours." We decline to accept your proposed construction, however, for the following reasons.

While the phrase "normal working hours" is neither defined in c. 268A nor discussed in its legislative history, we note that the phrase was adopted by the legislature nearly thirty years ago, when flex-time was not as prevalent as it is today. Then, it was more often the case that in most agencies (other than institutions, and the like, which are run on a 24 hour per day basis) the work day ran from 9 a.m. to 5 p.m., and employees were given little or no flexibility to shift their hours from that norm. With that historical reality in mind, we are not persuaded that the main object to be accomplished in §1(n) was to create a device that would allow a full-time employee to work odd hours so as to facilitate multiple municipal office holding. Indeed, the simplest reason for concluding that §1(n) is inapplicable to Mr. X's situation is that the employment outside of the "normal working hours" of one's public service contemplated by §1(n) is "personal and private employment." That language, according to its usual and accepted usage, cannot reasonably be interpreted to embrace Mr. X's public employment at Agency B. Thus, interpreting that language alone, we conclude that Mr. X may not enjoy special employee status in his position at Agency A.

An additional basis for this conclusion, however, may be found when one examines the words "normal working hours" in light of the legislative history and purpose of §1(n). Our examination of the legislative history and early commentary on the statute leads us to conclude that special employee status was primarily intended for those individuals whose public activities were not a substantial portion of their work day. In this way, the Commonwealth could enjoy the part-time services of these individuals, without penalizing them by unnecessarily restricting their private activity.

In 1962, a special commission completed an extensive study of conflict of interest issues. G.L. c. 268A was the product of that study. In the Final Report of the Special Commission, House Doc. No. 3650, at p. 12, it was noted that the proposed conflict of interest bill "defined special employees . . . as those who serve without compensation or those *whose condition of employment permits some personal and private activities on the part of the . . . employee"* (emphasis added). The Special Committee pointed out that, without the classification, it would be "impossible for the Commonwealth to have the service of specialists or other capable people for specific assignments in departments or agencies." *Id*. Thus, the critical consideration is whether the employee is permitted outside employment in the course of his municipal employment, and not whether such outside employment is carried on "in the nighttime, or at some other odd hours, [as] §normal working hours' should be determined...not by an arbitrary notion of which hours of the day are §normal' for work." *Buss*, "The Massachusetts Conflict-of-Interest Statute: An Analysis" 45 Boston L. Rev. 299, 314, n. 94.

Here, it is plain that Mr. X's full-time position with Agency A does not permit personal or private employment during his workday there. Indeed, so extensive is Mr. X's connection with the Agency A that his on-call status with that agency requires that he respond there, even if at that very moment he is assigned to be at work for Agency B. That the completion of Mr. X's full workday with the Agency A is before 5:00 p.m., or at such a time that there remain hours in the day in which he can work, is not dispositive. Rather, the interpretation of §1(n) that is most consistent with its legislative history is the one which recognizes that "employment §during normal working hours' means, generally, during all or a predominant part of such hours." *Buss* at 314. On the other hand, "when a substantial portion of the normal working day, or working week, are taken up with the employee's public duties, the relevant test is, under the third alternative, based on total compensated hours."[6/] *Id*. Quite obviously, as a full-time employee, Mr. X is unable to meet that test.

Finally, we note that an examination of prior versions of §1(n) also indicates that special municipal employee status was not contemplated to embrace full-time employment under most circumstances. Specifically, prior to April 27, 1965, §1(n) defined a special municipal employee as "a municipal employee whose position has been expressly classified ... as that of a special employee under the terms and provisions of this chapter." Responding to inquiries from municipal officials concerning the factors to be considered in assigning such

classification, the attorney general issued a memorandum outlining the relevant standards.[7/] That memorandum included as one of the six factors to be considered the "amount of compensation [received] in relation to that of a full-time employee." *Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law, Essays for Austin Wakeman Scott* 12 (1964). Clearly, therefore, special employee status was thought to be something other than full-time employment.

In short, viewing the plain language of §1(n) in its entirety and with attention to its main objective, we conclude that the stated prerequisites of §1(n) (i.e. an employee who volunteers his time, or who is paid but works a for a mere fraction of a year — 800 hours a year or less — or who is allowed private employment during his normal working hours) all embrace a character of employment that is different from ordinary full-time employment.[8/] Therefore, we believe that, absent special circumstances, full-time employees are regular employees, and cannot be designated as "special."[9/]

Since Mr. X cannot be designated as a "special municipal employee" in his Agency A position, he will be subject to the restrictions on multiple office holding contained in §20(b) of G.L. c. 268A.

2. Multiple office holding at the local level

Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by *any* municipal agency of the same city or town, in which the city or town is an interested party, unless an exemption applies.

As noted above, Mr. X does not qualify for designation as a "special" as employee of Agency A. Thus, he must meet all of the following conditions under §20(b) to also work at Agency B, as §20(b) is the only exemption available to "regular" municipal employees:

1. The second job must be with a completely independent agency, department or board. The individual may not participate in or have official responsibility for any of the activities of the second agency, and the first agency must not regulate activities of the second agency;

2. the position is publicly advertised;

3. the individual files a statement disclosing the second job with the city or town clerk;

4. the second job will be performed outside of the normal working hours of the first position;

5. the services performed in the second job are not part of the employee's duties in the first job;

6. the employee is not compensated in the second position for more than 500 hours per year;[10/]

7. the head of the second agency, department or board, certifies that no employee of that agency is available to do this work as part of their regular duties; and

8. the city or town council, board of aldermen, or board of selectmen give their approval of this exemption from §20.

Mr. X does not currently fulfill all of these §20(b) requirements. Since he works approximately 20 hours per week at Agency B, unless he works less than a full year, he will exceed the yearly time limit. Mr. X may not receive compensation in the Agency B post for more than 500 hours per year in order to qualify for a §20(b) exemption. Thus, as Mr. X does not qualify for a §20(b) exemption, he may not hold the full-time Agency A and part-time Agency B posts simultaneously.

However, if Mr. X were to be paid for 500 hours or less per year in his Agency B post, he may be eligible for a §20(b) exemption if he can fulfill the remainder of the §20(b) conditions. Specifically, Mr. X will need the certification described above by the head of Agency A, and approval of this exemption by the Board of Selectmen.

DATE AUTHORIZED: August 9, 1993

[1/] Mr. X has authorized this opinion request.

[2/]Agency One is a "municipal agency" for purposes of the conflict of interest law. A "municipal agency," is defined as any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(f).

[3/]"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

[4/]Approximately 20 weeks at 40 hours/week or 15 hours/week for a full year of employment.

[5/]For convenience, we will refer to this type of work schedule as "flex-time."

[6/]The "third alternative" refers to the portion of §1(n) which allows for "special" designation where the employee does not earn compensation for more than 800 hours in the position during the preceding 365 days.

[7/]*Edward W. Brooke, Attorney General, Memorandum re Classification Under Chapter 779 of the Acts of 1962 (March 8, 1963).*

[8/]*See, e.g., Buss*, 45 Boston Univ. L. Rev. 299, 314 (1965) ("It is clear that the special classification is intended to be reserved for those who in fact have limited contact with their level of government.")

[9/]Those who are permitted to have private employment during normal working hours may include consultants whose contracts do not include scheduled work hours, attorneys allowed to engage in the private practice of law during normal working hours, or full/part-time teachers at educational institutions who are expressly allowed time to do private research or study. These examples are not meant to be all inclusive.

[10/]Approximately 9.5 hours per week.